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IN THE

SUPREME COURT OF THE

UNITED STATES

NUMBER 392

OCTOBER TERM, 1969

BILLY JOE TANT and JOHN TED JENKINS,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE

UNITED STATES

NUMBER _____

OCTOBER TERM, 1969

BILLY JOE TANT and JOHN TED JENKINS,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Billy Joe Tant and John Ted Jenkins, the petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on June 4, 1969.

[In the Court of Appeals, said case is designated No. 26952, United States of America, Plaintiff-Appellee, versus Billy Joe Tant and John Ted Jenkins, Defendants-Appellants.]

Opinion Of Court Of Appeals

The opinion of the Court of Appeals has not appeared and will not appear in any official reports.

Said opinion has not yet appeared but will appear in the unofficial West reports (that is, the West Federal Reporter, Second Series). It is now believed that said opinion will so appear on or about August 15, 1969.

A copy of said opinion is appended hereto and marked "Appendix A".

Statement Of Grounds On Which Jurisdiction Of Supreme Court Is Invoked

The judgment of the Court of Appeals is dated June 4, 1969, and said judgment was entered on June 4, 1969.

The Court of Appeals entered the order denying petitioners' petition for rehearing in the Court of Appeals on June 27, 1969.

The statutory provision believed to confer on the Supreme Court jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari is 28 U. S. C. Section 1254. (1).

Question Presented For Review

Whether or not the Court of Appeals erred in holding that the District Court did not err in failing and refusing over the objection and at the request of counsel for petitioners to instruct the Jury that reasonable doubt as to the guilt of petitioners of the charged federal crimes could arise from the absence of evidence where a Government employee who witnessed such crimes and who was present at the trial was not called by the Government to testify as a witness and did not testify as a witness.

Constitutional Provision Involved

The Constitutional provision involved is as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property

be taken for public use, without just compensation. United States Constitution, Amendment V.

Statement Of The Case

Petitioners were tried by a Jury in the United States District Court for the Northern District of Georgia for criminal violations of Federal Internal Revenue laws as to alcohol. The Jury found petitioners guilty, the District Court sentenced them, they appealed to the United States Court of Appeals for the Fifth Circuit, the Court of Appeals affirmed the judgment of the District Court, petitioners petitioned the Court of Appeals for rehearing, the Court of Appeals denied petitioners' petition for rehearing, and petitioners now petition the Supreme Court for a Writ of Certiorari to review the judgment of the Court of Appeals.

The District Court failed and refused over the objection and at the request of counsel for petitioners to instruct the Jury that reasonable doubt as to the guilt of petitioners of said violations could arise from the absence of evidence.

The District Court charged the Jury in effect that the Jury could consider only the evidence introduced at the trial as to reasonable doubt as to the guilt of petitioners of said violations.

Clarence Lee Shew, a Government employee, witnessed said violations, was present at the trial, was not called by the Government to testify as a witness, and did not testify as a witness.

The basis of petitioners' appeal to the Court of Appeals was such failure and refusal of the District Court so to instruct the Jury.

The basis for federal jurisdiction in the District Court is 18 U.S.C. Section 3231, 26 U.S.C. Section 5205 (a) (2), 26 U.S.C. Chapter 51, 26 U.S.C. Section 5604 (a) (1), 26 U.S.C. Section 5121, and 26 U.S.C. Section 5691.

Argument

A reasonable doubt as to the guilt of petitioners could have arisen from the absence of the testimony of the Government's employee, Shew, who witnessed the violations in question and who was present at the trial.

The District Court erred in failing and refusing to instruct the Jury, over the objection and at the request of counsel for petitioners, that a reasonable doubt as to the guilt of petitioners could arise from the absence of evidence.

The Court of Appeals erred in holding that the District Court did not err in so failing and refusing so to instruct the Jury.

The Jury should be advised as to the effect of the absence of evidence on the subject of reasonable doubt. State v. Parkin, 299 N. W. 917, 230 Iowa 991; State v. Gratan, 256 N. W. 273, 218 Iowa 889.

A reasonable doubt may arise either from the evidence or from the absence of evidence;

and it is reversible error for the Trial Court not so to charge the Jury. Huist v. State, 166 So. 828, 123 Fla. 315; Carter v. State, 31 S. E. 2d 666, 71 Ga. App. 626; People v. Mundy, 127 N. E. 364, 293 Ill. 191; Ridge v. State, 137 N. E. 758, 192 Ind. 639; State v. Blackburn, 22 N. W. 2d 821, 237 Iowa 1019; Spreitzer v. State, 50 N. W. 2d 516, 155 Neb. 70; State v. Wood, 70 S. E. 2d 665, 235 N. C. 636; State v. Herwitz, 186 P. 290, 109 Wash. 153; City of Sioux Falls v. Wolf, 114 N. W. 2d 100, 79 S.D. 519.

It is reversible error for the Trial Court to instruct the Jury that a reasonable doubt must arise out of the evidence introduced because this excludes reasonable doubts that may arise from the absence of evidence. State v. Parkin, 299 N. W. 917, 230 Iowa 991; State v. Gratan, 256 N. W. 273, 218 Iowa 889; State v. Walker, 166 A. 2d 567, 33 N. J. 580.

The Fifth Amendment to the Constitution of the United States provides in part that no person shall be deprived of life, liberty, or property without due process of law.

The concept of fairness inherent in the due process clause demands that the District Court should instruct the Jury in a Federal criminal case that reasonable doubt as to the guilt of the accused can arise from the absence of evidence.

This is an important question of Federal law which has not been but which should be settled by the Supreme Court and which the Court of Appeals decided wrongly and adversely to pe-

titioners.

The Supreme Court should grant petitioners' Petition for Writ of Certiorari, review the decision of the Court of Appeals, reverse the decision of the Court of Appeals, and order that a new trial be granted to petitioners.

Most respectfully submitted,

Cullen M. Ward

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26952

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

BILLY JOE TANT and JOHN TED JENKINS,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Georgia

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(June 4, 1969)

Before BROWN and GODBOLD, Circuit Judges, and CABOT, District Judge.

PER CURIAM: Billy Joe Tant and John Ted Jenkins appeal from their conviction for offenses involving untaxed whiskey[1]. Their sole attack is on the court's charge, or, more specifically, its lack of charge. They complain that the trial judge refused to instruct the jury that reasonable doubt may arise from the lack of

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[1]Counts One and Two charged defendants with aiding and abetting each other in the possession and sale of a quantity of untaxed whiskey. 26 U.S.C. § 5604(a)(1). Count Three charged them with carrying on a retail liquor dealer business and failure to pay the required tax thereon. 26 U.S.C. § 5691.

evidence. This request was prompted by the fact that a government informer, or "special employee," was sworn at the beginning of the trial, was present throughout the trial, yet was not called as a witness by the government.[2] It is clear that his testimony would be cumulative since the government agents whom he had accompanied at each sale had testified to the facts of the sales.

The various United States Courts of Appeal who have considered this question have uniformly held that it is not error for the trial judge to refuse to charge that reasonable doubt could arise from the lack or failure of evidence. *Laughlin v. United States,* 385 F.2d 287 (D.C. Cir. 1967); *United States v. Meisch,* 370 F.2d 768 (3 Cir. 1966); *United States v. Caruso,* 358 F.2d 184 (2 Cir. 1966). In the charge given, the court instructed that the jury, in passing on the question of reasonable doubt, should consider "all the facts and circumstances and evidence in the case . . . ."

Thus, in this case, as in those cited, the instructions on reasonable doubt were adequate to give the jury an understanding of that concept. As such, it is not error for the judge to refuse to instruct specifically that reasonable doubt may arise from the lack or absence of evidence.

Accordingly, the judgment below is AFFIRMED.

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[2]Nor was he called by the defendants, notwithstanding the fact that, by his presence in the courtroom, he was available to them. Therefore no unfavorable inference may arise by the government's failure to call him. See *Beale v. United States,* 263 F.2d 215 (5 Cir. 1959).

CERTIFICATE OF SERVICE

I certify that I today served the foregoing Petition for a Writ of Certiorari upon counsel of record for Respondent in the District Court and in the Court of Appeals (Messrs. F.D. Hand, Jr., and Charles B. Lewis, Jr., United States Attorneys, P. O. Box 912, Atlanta, Georgia 30301) by depositing three copies of the same in the United States Post Office at Atlanta, Georgia, with First Class postage prepaid addressed to said counsel at their Post Office address in compliance with Rule 33 (1) of the Rules of the Supreme Court of the United States.

I certify that I today served the foregoing Petition for a Writ of Certiorari upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by depositing three copies of the same in the United States Post Office at Atlanta, Georgia, with Air Mail postage prepaid addressed to said Solicitor General at his Post Office address in compliance with Rule 33 (2) (a) of the Rules of the Supreme Court of the United States.

I certify that all parties required to be served by Rule 33 of the Rules of the Supreme Court of the United States have been served as provided by said Rule.

This, the 24th day of July, 1969.

Cullen M. Ward

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 392

BILLY JOE TANT AND JOHN TED JENKINS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1969. A petition for rehearing was denied on June 27, 1969. The petition for a writ of certiorari was filed on July 28, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court erred in declining to charge that a reasonable doubt may arise from a lack of evidence.

361-371—69

STATEMENT

1. After a jury trial in the United States District Court for the Northern District of Georgia, petitioners were convicted on three counts charging violation of the federal liquor laws. On October 15, 1968, petitioner Tant was sentenced to imprisonment for concurrent terms of three years; petitioner Jenkins received concurrent two-year terms, six months of which were to be served, with five years' probation. The court of appeals affirmed per curiam (Pet. App. A).

The evidence showed that on August 29, 1966, Alcohol and Tobacco Tax agents Frazier and Orsini hired Clarence Lee Shew as a special employee to assist in locating liquor law violators in the area of Atlanta, Georgia (R. 121).[1] The agents instructed Shew not to entice individuals into selling him liquor and not to offer more than the going rate (R. 99–100, 124). On the evening of September 6, Shew and agent Frazier met petitioner Tant at his service station in Cartersville, Georgia. Shew offered to buy fifteen cases (ninety gallons) of whiskey. Tant replied that he would not sell less than one hundred gallons at a time. Shew agreed to that minimum. Tant asked Jenkins, who was standing nearby, whether they had any liquor immediately available. Jenkins replied that they had about thirty gallons. Following a telephone call, Tant told Shew and Frazier that he had just sold the last of a 200-gallon supply, and directed them to call again

[1] Citations are to the "Transcript of Record," filed with the Clerk of this Court.

on September 9. Tant set the price at $4 per gallon (R. 19–21).[2]

On September 9, Frazier and Shew returned to the service station and placed an order for seventeen cases (102 gallons). Tant told them his new supply would not be ready for two days. He said that he would meet them on the morning of September 11 at a roadside picnic table located on Route 41 (R. 31). At the appointed time and place Tant and Jenkins met the agent and special employee. Tant drove their car away after telling them to wait ten minutes and then go with Jenkins (R. 32). After the short wait Jenkins drove them to a small dirt road nearby, where they met Tant. The agent's car was loaded with non-tax paid whiskey (R. 33). Tant was paid $408 in funds furnished by the government (R. 75).

On the evening of September 23, 1966, Shew and agent Orsini drove to Tant's service station to make another 102-gallon purchase. Tant and Jenkins led Orsini and Shew to a church in a nearby town. Tant then drove the agent's car away. He returned with the illicit liquor in less than a half-hour. Shew paid Tant $408 in government-furnished funds (Tr. 80–87). While there, Tant remarked, "I always have plenty liquor. Any time you need more, just let me know a day ahead of time and I will have it for you" (R. 87).

2. The government's evidence was furnished by

[2] At that time Jenkins also introduced Frazier and Shew to co-defendant Julian Wesley Goodwin, who proceeded to sell them 18 gallons of non-tax paid whiskey. Goodwin was indicted separately but tried jointly with petitioners for this sale. He was convicted and sentenced to probation for two years (R. 21–25, 203).

agents Frazier and Orsini. Although the informer, Shew, was present in the courtroom, he was not called. Petitioners presented no evidence. Defense counsel's closing argument was directed in large part at the informer. He called the jury's attention to the government's failure to put Shew on the witness stand, and strongly suggested that had Shew been called to testify he would have admitted unlawfully entrapping the defendants into selling the liquor (R. 134–136). The government responded that Shew was equally available to the defense counsel and was not called because his testimony would only have been cumulative (R. 151). Following the court's charge, defense counsel requested a supplementary instruction covering Shew's absence from the witness stand, to the effect that lack of evidence could create a reasonable doubt. The court denied the request (R. 178–190).

ARGUMENT

Although an instruction that a reasonable doubt can arise from a lack of evidence is not inappropriate, the federal courts have held that failure to give such an instruction is not error where the charge as a whole properly conveys to the jury the concept of reasonable doubt. *Laughlin* v. *United States,* 385 F. 2d 287 (C.A.D.C.), certiorari denied, 390 U.S. 1003; *United States* v. *Meisch,* 370 F. 2d 768 (C.A. 3); *United States* v. *Caruso,* 358 F. 2d 184 (C.A. 2), certiorari denied, 385 U.S. 862. As the court of appeals for the District of Columbia observed in *Laughlin, supra,* 385 F. 2d at 295:

> * * * in a case where some lack of evidence for the government fairly creates a reasonable

> doubt of guilt, we may expect a normally intelligent jury to perceive that fact after comparison and consideration of all the evidence. * * *

In petitioner's case the reasonable doubt charge given, combined with instructions on presumption of innocence, burden of proof, and consideration of all the facts and circumstances in the case, adequately directed the jury.

Moreover, in light of the evidence adduced at petitioner's trial, there was no basis for an instruction on lack of evidence. The evidence of guilt was ample. All that was missing was the testimony of an informer whom the governmnt declined to call to avoid cumulative testimony, but who was equally available to the defense. His absence from the witness stand benefited petitioners by enabling defense counsel to suggest to the jury that the government had an ulterior and somewhat suspicious reason for not calling him.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969